

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

DEBORAH ANDERSON,

Plaintiff,

v.

AMERICAN AIRLINES, INC., a Delaware
corporation, ROY GAMMON and DOES 1
through 50,

Defendants.

No. C 04-4649 CW

ORDER GRANTING
DEFENDANT'S
MOTION TO DISMISS

Defendant American Airlines, Inc. moves, pursuant to Federal Rule of Civil Procedure 12(b)(6), to dismiss all six causes of action in the second amended complaint (SAC) filed by Plaintiff Deborah Anderson. Plaintiff opposes the motion. The matter was heard on June 24, 2005. Having considered the parties' papers and oral argument on the motion, the Court GRANTS American's motion to dismiss.

FACTUAL BACKGROUND

The following facts are alleged in the SAC. Plaintiff is of African and Belizean descent. She was hired by American on November 18, 1991. In March, 2002, Shannon Stewart began as

1 Plaintiff's general manager in American's Oakland facility. Ms.
2 Stewart harassed Plaintiff by making derogatory comments regarding
3 Plaintiff's race and status as a single mother. Plaintiff
4 complained to American management about Ms. Stewart's comments,
5 which resulted in Ms. Stewart being replaced by Defendant Roy
6 Gammon.

7 Soon after Mr. Gammon assumed the position of general manager,
8 he began harassing Plaintiff by, inter alia, requiring her to
9 perform administrative duties while not allowing her sufficient
10 time to complete them, sending her demeaning emails, requiring her
11 to work without pay after hours and on weekends, and wrongfully
12 denying her requests for vacation and leave time.

13 On February 24, 2003, Mr. Gammon issued Plaintiff a "Career
14 Decision Day Letter," which required Plaintiff to choose between
15 terminating her employment or remaining employed with American, but
16 with the stipulations that (1) American could terminate Plaintiff
17 without cause, and (2) Plaintiff would lose the right to file union
18 grievances.

19 On February 28, 2003, Plaintiff was admitted to the emergency
20 room due to stress, and was placed on temporary medical leave. On
21 March 3, 2003, Plaintiff called Mr. Gammon to inform him that she
22 had been cleared to return to work starting March 7. Mr. Gammon
23 told Plaintiff that he would not accept her medical release.
24 Plaintiff called Mr. Gammon again on March 10 to inquire about the
25 status of her employment. Mr. Gammon informed Plaintiff that her
26 employment status had not been determined because she had failed to
27 choose an option from the Career Decision Day Letter. Plaintiff
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1 reported Mr. Gammon's conduct to American management. Plaintiff
2 was terminated on March 14, 2003. At the time Plaintiff was
3 terminated, she held a management position at American.

4 PROCEDURAL HISTORY

5 I. Administrative Procedural History

6 On March 4, 2003, after Plaintiff had apparently contacted its
7 Oakland office, the Equal Employment Opportunity Commission (EEOC)
8 sent her a letter and an employment discrimination questionnaire.
9 The letter stated, inter alia, that (1) if Plaintiff did not check
10 a particular box on the questionnaire, the EEOC would consider the
11 questionnaire a formal charge, and (2) "If we do not hear from
12 further from you, within 30 days after we notify the employer of
13 the charge, we will dismiss it." On March 12, 2003, Plaintiff
14 submitted the EEOC questionnaire describing her allegations against
15 American; she did not check the box that the agency had identified.
16 In an attachment to the questionnaire, Plaintiff alleged
17 discrimination and harassment based upon her national origin and
18 retaliation for complaining about the discrimination and
19 harassment.

20 On June 30, 2003, Plaintiff's counsel submitted a letter to
21 the EEOC requesting a right-to-sue letter based upon the March 12
22 questionnaire. There is no evidence of any other communication
23 between Plaintiff and the EEOC until March 9, 2005, when
24 Plaintiff's counsel sent the EEOC another letter requesting a
25 right-to-sue letter. In a letter dated March 15, 2005, the EEOC
26 stated the following: "A review of this office's records discloses
27 no charge was filed by your client against the above named
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1 employer." The letter also stated that Plaintiff could submit a
2 formal charge or, in the alternative, she could re-submit the March
3 12, 2003 questionnaire in place of a formal charge. In a letter
4 dated March 30, 2005, Plaintiff's counsel stated that he had
5 enclosed a "copy of the charges," although it is not clear from the
6 record whether he filed an additional charge or re-sent the March
7 12, 2003 questionnaire.

8 On April 22, 2005, the Department of Fair Employment and
9 Housing (DFEH) received a charge of discrimination from Plaintiff.
10 In the section of the charge form in which Plaintiff was directed
11 to detail her allegations of discrimination, Plaintiff wrote "See
12 Attachments," and she attached the 2003 EEOC questionnaire. Also
13 on April 22, 2005, the DFEH issued Plaintiff a right-to-sue letter.

14 II. Litigation Procedural History

15 On March 2, 2004, Plaintiff filed her initial complaint in the
16 Superior Court for the County of San Francisco. However, that
17 complaint only referred to Plaintiff on its cover page; the
18 remainder of the complaint referred to a plaintiff named Mr.
19 Nolasco. On September 13, 2004, Plaintiff filed a first amended
20 complaint (FAC) in State court that alleged nine causes of action:
21 (1) "tortuous wrongful termination" based upon "Plaintiff's
22 discharge because she engaged in a protected activity of seeking
23 medical leave," (2) "harassment," which Plaintiff alleged had
24 occurred because she had complained to American management about
25 the conduct of Ms. Stewart and Mr. Gammon, (3) "wrongful
26 termination," also allegedly a result of Plaintiff's complaints to
27 management, (4) "wrongful termination in violation of public policy
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1 -- Government Code § 12920" [discrimination based upon a medical
2 condition], (5) "wrongful termination in violation of public policy
3 -- Government Code § 12940(n)" [failure reasonably to accommodate
4 an employee's medical condition], (6) "retaliation" based upon
5 Plaintiff's allegations that she was terminated because she
6 complained to management of harassment, (7) "breach of implied
7 covenant of good faith and fair dealing," (8) "intentional
8 infliction of emotional distress," and (9) "negligent infliction of
9 emotional distress."

10 On November 3, 2004, American removed the action to this
11 Court. Mr. Gammon did not join in the removal because he had not
12 been served with either the initial complaint or the FAC. On
13 November 9, American moved to dismiss the first, third, seventh,
14 eighth and ninth causes of action in the FAC. Plaintiff filed a
15 statement of non-opposition, and the Court granted the motion;
16 these causes of action were dismissed with prejudice.

17 On March 4, 2005, American moved under Federal Rule of Civil
18 Procedure 12(c) for judgment on the pleadings on Plaintiff's
19 remaining causes of action. On April 8, 2005, the Court held a
20 hearing on American's motion. At that hearing, the Court made a
21 bench ruling denying American's motion but dismissing Plaintiff's
22 claims; Plaintiff was given forty-five days to file a second
23 amended complaint. Plaintiff was also given an additional forty-
24 five days to serve Mr. Gammon. At the hearing, Plaintiff's counsel
25 represented to the Court that he did not intend to add any new
26 parties or claims, and he was not given leave to do so. On April
27 19, 2005, the Court issued a written order on American's Rule 12(c)

1 motion. Specifically, the Court ruled as follows: (1) although it
2 was not clear from the FAC which legal theories Plaintiff was
3 asserting, the Court construed her harassment (second cause of
4 action) and retaliation (sixth cause of action) claims as arising
5 under the Fair Employment and Housing Act (FEHA) and Title VII, but
6 ruled that Plaintiff had failed to allege that she had exhausted
7 her administrative remedies for such claims; and (2) dismissed
8 Plaintiff's wrongful termination (fourth and fifth causes of
9 action) claims because Plaintiff had not adequately plead that she
10 suffered from a "mental disability," as that term is defined under
11 FEHA. Plaintiff was granted leave to amend these claims, but was
12 not granted leave to add additional claims.

13 On May 4, 2005, Plaintiff filed the SAC. The SAC alleges the
14 following causes of action: (1) "Wrongful Discharge in Violation of
15 Fundamental Public Policy (Racial Discrimination based on Title
16 VII, and Govt. Code §§ 12900-12996 [FEHA])," (2) "Wrongful
17 Discharge in Violation of Fundamental Public Policy (National
18 Origin based on Title VII, Govt. Code §§ 12900-12996 [FEHA] and
19 Cal. Const. Art. I § 8)," (3) "Wrongful Discharge in Violation of
20 Fundamental Public Policy (Mental Disability Discrimination, Govt.
21 Code § 12940(a), and the Americans with Disabilities Act of 1990,
22 42 USC §§ 12101 - 12213)," (4) "Tortious termination in Violation
23 of Fundamental Public Policy (Termination based on Medical
24 Condition in violation of the California Family Rights Act, Govt.
25 Code § 12945.2)" [employer required to grant medical leave],
26 (5) "Retaliation in Violation of Govt. Code § 12940(h)"
27 [retaliation for engaging in protected oppositional activity], and
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(6) "Unlawful Business Practices, Business and Professions Code, §§ 17000 et seq., and §§ 17200 et seq."

LEGAL STANDARD

A motion to dismiss for failure to state a claim will be denied unless it is "clear that no relief could be granted under any set of facts that could be proved consistent with the allegations." Falkowski v. Imation Corp., 309 F.3d 1123, 1132 (9th Cir. 2002), citing Swierkiewicz v. Sorema N.A., 534 U.S. 506 (2002). A complaint must contain a "short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a). "Each averment of a pleading shall be simple, concise, and direct. No technical forms of pleading or motions are required." Fed. R. Civ. P. 8(e). These rules "do not require a claimant to set out in detail the facts upon which he bases his claim. To the contrary, all the Rules require is 'a short and plain statement of the claim' that will give the defendant fair notice of what the plaintiff's claim is and the grounds on which it rests." Conley v. Gibson, 355 U.S. 41, 47 (1957).

When granting a motion to dismiss, a court is generally required to grant a plaintiff leave to amend, even if no request to amend the pleading was made, unless amendment would be futile. Cook, Perkiss & Liehe, Inc. v. N. Cal. Collection Serv. Inc., 911 F.2d 242, 246-47 (9th Cir. 1990). In determining whether amendment would be futile, a court examines whether the complaint could be amended to cure the defect requiring dismissal "without contradicting any of the allegations of [the] original complaint." Reddy v. Litton Indus., Inc., 912 F.2d 291, 296 (9th Cir. 1990).

DISCUSSION

I. First and Second Causes of Action

Plaintiff alleges causes of action for wrongful termination based upon her race and national origin.

American argues that these claims should be dismissed because they are barred by the statute of limitations. A common law claim for wrongful discharge in violation of public policy is governed by a two-year statute of limitations. Cal. Civ. Proc. Code § 335.1; Mathieu v. Norrell Corp., 115 Cal. App. 4th 1174, 1189 n.14 (2004). Here, Plaintiff alleges that she was terminated on March 14, 2003, and she did not file the SAC until May 4, 2005. American argues that these claims do not relate back either to the original complaint or to the FAC because Plaintiff did not allege them in either pleading. However, Plaintiff disclaims any intent to sue for wrongful termination in violation of public policy against discrimination based upon race and national origin.

Plaintiff argues that her first and second causes of action are actually FEHA and Title VII claims and are not time-barred because she obtained a right-to-sue letter from the DFEH on April 22, 2005. At the hearing, Plaintiff maintained that this right-to-sue letter was based upon her recent submission to the DFEH of a copy of the March 12, 2003 EEOC questionnaire. Plaintiff contends that the right-to-sue letter authorizes her first and second causes of action, and that she should not be penalized because the letter was not timely issued to her. However, Plaintiff prepared the EEOC questionnaire before she was terminated, and it alleged only discrimination and harassment based upon her national origin.

1 Thus, even if the Court were to construe Plaintiff's first and
2 second causes of action as arising under Title VII and FEHA, the
3 questionnaire could not exhaust those causes of action for wrongful
4 termination based upon her race and national origin.

5 For the foregoing reasons, the first and second causes of
6 action must be dismissed; they are dismissed with prejudice because
7 Plaintiff has already had one opportunity to amend her Title VII
8 and FEHA claims.

9 II. Third Cause of Action

10 American argues that the Court should dismiss Plaintiff's
11 third cause of action, for "Wrongful Discharge in Violation of
12 Fundamental Public Policy (Mental Disability Discrimination, Govt.
13 Code § 12940(a), and the Americans with Disabilities Act of 1990,
14 42 USC §§ 12101 - 12213)." In the April 19, 2005 order dismissing
15 Plaintiff's first amended complaint, the Court granted Plaintiff
16 leave to amend this cause of action:

17 Plaintiff may be able to allege that she has a "mental
18 disability." Depression may meet the definition of a mental
19 disability under FEHA. Auburn Woods I Homeowners Ass'n. v.
20 Fair Employment & Housing Comm'n, 121 Cal. App. 4th 1578,
21 1592-93 (2004). Thus, Plaintiff may amend her complaint, if
22 she is truthfully able to do so, to allege that the FEHA
23 articulates a fundamental public policy that protects her from
24 discrimination based upon her mental disability, and that
25 American discriminated against her because of this mental
26 disability.

27 The SAC does not allege that Plaintiff has a mental disability
28 as that term is defined under FEHA; Plaintiff alleges only that she
"end[ed] up in the emergency room due to stress," and that she was
able to return to work several days later. She does not allege
that she suffers from depression, nor does she allege that she has

1 any mental or physical impairment that would qualify as a mental
2 disability under FEHA or as a "disability," as that term is defined
3 by the Americans with Disabilities Act. Thus, Plaintiff's third
4 cause of action fails to state a claim, and must be dismissed.
5 Because Plaintiff has had one opportunity to amend this claim, it
6 is dismissed with prejudice.

7 III. Fourth Cause of Action

8 Plaintiff's fourth cause of action is "Tortious termination in
9 Violation of Fundamental Public Policy (Termination based on
10 Medical Condition in violation of the California Family Rights Act,
11 Govt. Code § 12945.2)." According to the SAC, this cause of action
12 arises from American's alleged refusal "to allow Plaintiff to
13 return to her employment position after her doctor released her to
14 return to work from medical leave."

15 In Plaintiff's FAC, the first cause of action was "tortuous
16 wrongful termination," which was based upon "Plaintiff's discharge
17 because she engaged in a protected activity of seeking medical
18 leave." Plaintiff did not state a legal theory under which that
19 cause of action was brought. American moved to dismiss the claim,
20 and Plaintiff filed a statement of non-opposition to the motion.
21 On December 13, 2004, the Court dismissed the claim with prejudice.

22 The only material difference between the dismissed claim and
23 the fourth claim in the SAC is that, in the SAC, Plaintiff cites
24 California Government Code section 12945.2, which covers employees'
25 rights to return to work after taking medical leave. Presumably,
26 that is the same statute under which Plaintiff brought the first
27 cause of action in the FAC. The SAC's fourth cause of action is
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1 the same claim that the Court dismissed with prejudice in its
2 December 13 order. Thus, Plaintiff's fourth cause of action is
3 dismissed with prejudice.

4 IV. Fifth Cause of Action

5 American moves to dismiss Plaintiff's retaliation claim, which
6 is the fifth cause of action in the SAC. American argues that
7 Plaintiff has failed to exhaust her administrative remedies for the
8 claim.

9 In its April 19, 2005 order, the Court construed Plaintiff's
10 retaliation claim as arising under FEHA and Title VII. The Court
11 ruled that Plaintiff had not included, in the FAC, any factual
12 bases for her argument that the March 12, 2003 EEOC questionnaire
13 constituted a formal charge, and ruled further that the
14 questionnaire that Plaintiff had submitted to the Court, which did
15 not include the attachment that apparently had been submitted to
16 the EEOC describing her allegations of discrimination, harassment
17 and retaliation, did not adequately describe the actions of which
18 she complained. The Court dismissed the retaliation claim with
19 leave to amend, ruling that Plaintiff was required to show that she
20 had satisfied the two requirements for exhaustion: (1) timely
21 filing of an administrative charge of retaliation, and
22 (2) obtaining a right-to-sue letter or, in the alternative,
23 justifying her lack of a right-to-sue letter.

24 Plaintiff has now submitted (1) the EEOC questionnaire,
25 (2) the questionnaire attachment that details Plaintiff's
26 allegations of discrimination and harassment based upon her
27 national origin and retaliation for her complaints about the
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1 discriminating and harassing activity, (3) the letter sent by the
2 EEOC which stated that, if Plaintiff did not check a particular
3 box, the questionnaire would be considered a formal charge, and
4 (4) the letter dated June 30, 2003 from Plaintiff's counsel
5 requesting a right-to-sue letter based upon the questionnaire.

6 Plaintiff's fifth cause of action alleges retaliation based
7 upon protected oppositional activity while employed at American,
8 but it states that she was retaliated against for taking medical
9 leave. Taking medical leave is not oppositional activity.

10 Furthermore, Plaintiff's EEOC questionnaire and its attachment
11 allege retaliation based only upon Plaintiff's complaints about
12 national origin discrimination. Retaliation for complaining of
13 national origin discrimination is not alleged in the SAC.

14 Plaintiff's counsel represented at the hearing that the EEOC
15 questionnaire and its attachment constituted the charge upon which
16 Plaintiff is basing her claims in this case. Thus, Plaintiff has
17 failed to exhaust her administrative remedies for her fifth cause
18 of action for retaliation for taking medical leave.

19 V. Sixth Cause of Action

20 Plaintiff has alleged, for the first time, a cause of action
21 for unlawful business practices arising out of American's alleged
22 requirement that Plaintiff work more than forty hours per week
23 while only receiving wages for forty hours of work.

24 This cause of action must be dismissed. First, Plaintiff's
25 counsel represented to the Court at the April 8 hearing that he
26 would not add new parties or claims, and he was not granted leave
27 to do so. Second, the SAC alleges that Plaintiff was a member of

1 management at American. Individuals employed in executive,
2 administrative or professional categories are generally exempt from
3 the provisions of State law requiring overtime compensation for
4 overtime work. Cal. Lab. Code § 515(a). In her opposition brief,
5 Plaintiff argues that American had relieved her of supervisory
6 duties. However, that allegation is not made in the SAC. Thus,
7 Plaintiff's sixth cause of action fails to state a claim upon which
8 relief can be granted, and must be dismissed. The Court does not
9 grant leave to amend this claim because Plaintiff did not have
10 leave to file it and it is not related to the remainder of her
11 complaint. However, the dismissal is without prejudice to refileing
12 as a separate case, if Plaintiff truthfully can do so without
13 contradicting the allegations in her earlier complaints or running
14 afoul of the statute of limitations.

15 VI. Defendant Gammon

16 At the April 8, 2005 hearing, the Court noted that Plaintiff
17 had failed to serve Mr. Gammon within the 120-day time limit
18 mandated by Federal Rule of Civil Procedure 12(m). At that
19 hearing, the Court granted Plaintiff an extension of time to serve
20 Mr. Gammon and set a deadline of May 23, 2005. To date, Plaintiff
21 still has not served Mr. Gammon with any pleading in this case.
22 Thus, the claims against Mr. Gammon are dismissed.

CONCLUSION

For the foregoing reasons, American's motion to dismiss each claim in the SAC (Docket No. 36) is GRANTED. Plaintiff's first, second, third, fourth and fifth claims are dismissed with prejudice. Plaintiff's sixth cause of action is dismissed without prejudice.

IT IS SO ORDERED.

Dated: 7/20/05



CLAUDIA WILKEN
United States District Judge